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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

BILTMORE FOREST RADIO, INC., and
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP
Petitioners

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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June 1, 1998

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QUESTIONS PRESENTED FOR REVIEW

(a) Whether the intervention of U.S. Senators Jesse Helms and Lauch Faircloth in this proceeding to advocate the grant of the application of Orion Communications Limited, and thereby to influence the actions of the U.S. Court of Appeals for the D.C. Circuit and the Federal Communications Commission ("FCC"), violated Article III of the U.S. Constitution and violated the "due process" rights, under the Fifth Amendment, of Biltmore Forest Radio, Inc. ("BFR") and Willsyr Communications, Limited Partnership, to fairly compete with Orion for both the interim and permanent license for the Biltmore Forest FM frequency, thus requiring the invalidation of the D.C. Circuit's decision in Orion Communications Limited v. FCC, 131 F.3d 176 (1997), which reversed orders of the FCC that were in favor of BFR and Willsyr, and which granted the application of Orion as demanded by Senators Helms and Faircloth?

(b) Whether the decision of the D.C. Circuit in Orion Communications Limited v. FCC, 131 F.3d 176, reversing orders of the FCC, exceeded the authority of Federal appeals courts to review agency actions, pursuant to 5 U.S.C. 706 (2), and whether the decision improperly substituted the judgment of the D.C. Circuit for that of the FCC, in direct conflict with FCC v. WOKO, 329 U.S. 223, 228-229 (1946), thus requiring that the decision be invalidated?

PARTIES TO THE PROCEEDING

The following persons or entities were parties to the FCC proceeding in MM Docket No. 88-577 to select a permanent licensee for an FM frequency in Biltmore Forest, North Carolina, and to the appeals before the D.C. Circuit in Case Nos. 96-1430, 98-1026, and 98-1060:

Federal Communications Commission
Biltmore Forest Radio, Inc.
Orion Communications Limited
Skyland Broadcasting Company
Biltmore Forest FM Broadcasting, Inc.
Willsyr Communications, Limited Partnership
Liberty Productions, a Limited Partnership

Biltmore Forest Radio, Inc. is a North Carolina non-profit corporation, which was incorporated in 1995. The members are Skyland Broadcasting Company; Biltmore Forest FM Broadcasting, Inc.; Liberty Productions, a Limited Partnership; and Willsyr Communications, Limited Partnership. The corporation is not publicly owned and is not affiliated with any entities, other than as disclosed herein. No debt securities have been publicly issued. The sole activity of the corporation is to engage in broadcasting.

Willsyr Communications, Limited Partnership, is a North Carolina Limited Partnership, which was formed in 1987. Its General Partner is Sharan A. Harrison, and its Limited Partners are William, Marilyn, and Lee Eaton.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Biltmore Forest Radio, Inc. ("BFR") and Willsyr Communications, Limited Partnership ("Willsyr"), respectfully request that a writ of certiorari issue to review the decision and orders of the U.S. Court of Appeals for the D.C. Circuit in Case Nos. 96-1430, 98-1026 and 98-1060.

OPINIONS BELOW

The decision and orders of the D.C. Circuit are cited in the Table of Authorities and included in the Appendix. The orders are unreported. The decision is reported as Orion Communications Limited v. FCC, 131 F.3d 176 (1997) (Judge Douglas Ginsburg) (cited herein as "Orion v. FCC").

JURISDICTION

The D.C. Circuit in Orion v. FCC, Case No. 96-1430, issued December 19, 1997, (App. H, 39a), reversed orders of the Federal Communications Commission ("FCC") in Orion Communications, Ltd., 10 FCC Rcd 13066 (1995) (App. B, 2a), aff'd, 11 FCC Rcd 19589 (1996) (App. C, 10a). The FCC had directed Orion Communications Limited ("Orion") to cease its unauthorized and for-profit broadcast operations on FM Channel 243 A in Biltmore Forest, North Carolina, to allow Biltmore Forest Radio, Inc. ("BFR"), to operate.

The D.C. Circuit's reversal of the orders of the FCC was after U.S. Senators Jesse Helms and Lauch Faircloth (R-NC) intervened in this proceeding to advocate

the interests of Orion. Their intervention followed the D.C. Circuit's denial, on February 27, 1997, of Orion's motion for stay of the FCC's 1995-96 orders (App. D, 20a). The FCC orders went into effect on June 2, 1997, with the commencement of BFR's non-profit joint interim operations and the cessation of Orion's unauthorized and for-profit operations (App. F, 25a).

BFR is a joint interim non-profit operator that is open to all of the five competing applicants for the permanent license for the Biltmore Forest FM frequency, pursuant to 47 C.F.R. 73.3592 (b) (App. S, 66a) and Consolidated Nine, Inc. v. FCC, 403 F.2d 585, 589-590 (D.C. Cir. 1968). Orion, which is a competing applicant for the permanent license, had refused to participate in BFR. Willsyr Communications, Limited Partnership ("Willsyr"), which is a competing applicant for the permanent license, is one of four members of BFR.

The FCC has not yet made a final grant of the permanent license for the Biltmore Forest frequency. The BFR joint interim operation was to continue until, pursuant to Bechtel v. FCC ("Bechtel II"), 10 F.3d 875 (D.C. Cir. 1993), the FCC had selected a permanent licensee among the five competing applicants for the frequency, which includes Willsyr and Orion. The decision in Orion v. FCC, however, at the behest of Senators Helms and Faircloth, directed the FCC to

immediately allow Orion to operate on the frequency on a for-profit basis, to the exclusion of BFR and to Willsyr and the other competing applicants (App. H, 54a).

On January 14, 1998, the mandate in the December 19, 1997, decision in Orion v. FCC was issued at the demand of Orion (App. I, 55a). This was before the time had expired for a petition for rehearing or suggestion for hearing in banc to be filed by BFR.

On January 16, 1998, the FCC carried out the mandate by issuing an order to BFR to cease, within 12 hours, its previously authorized operations in favor of Orion. See, Order, FCC 98-4 (App. J, 56a). On the same day, BFR appealed the order to the D.C. Circuit in Case No. 98-1026. It also filed an emergency motion for stay.

BFR's emergency motion for stay was denied on January 16, 1998, by the same panel as in Orion v. FCC (App. K, 58a). Its appeal was dismissed by that same panel on the rationale that all the issues raised therein were either answered or precluded by Orion v. FCC. See, Order, filed March 2, 1998 (App. M, 60a).

BFR timely filed on February 2, 1998, a petition for rehearing and suggestion for hearing in banc of Orion v. FCC. A separate motion for recall of the mandate was also filed. The petition and motion were denied, without an opinion. See, Order, filed March 2, 1998 (App. L, 59a).

Willsyr timely filed with the D.C. Circuit on February 10, 1998, in Case No.

98-1060, a notice of appeal of the FCC's January 16, 1998, order in FCC 98-4. It was not a party to the proceeding in the December 19, 1997, decision.

Willsyr raised issues that its interests and status as a competing applicant for the permanent license for the Biltmore Forest FM frequency had been adversely affected by the FCC's January 16, 1998, order. On March 2, 1998, the same panel as in Orion v. FCC ordered Willsyr to show cause why its notice of appeal should not be dismissed because it appears that all possible issues that could be raised in this matter have already been considered and decided in the December 19, 1997, decision.

Willsyr filed its response on March 17, 1998. It also filed a motion to recuse from the panel the same judges that had rendered Orion v. FCC. The same judges as in that decision denied the motion to recuse themselves and dismissed the appeal, without an opinion. See, Order, filed March 31, 1998 (App. N, 63a).

The jurisdiction of this Court is timely invoked under 28 U.S.C. 1254 (1). BFR is filing its petition within 90 days of the D.C. Circuit's denial on March 2, 1998, of its petition for rehearing of the December 19, 1997, decision in Orion v. FCC, Case No. 96-1430. The petition of BFR is also timely filed with respect to the D.C. Circuit's dismissal on March 2, 1998, of its appeal of the FCC's January 16, 1998, order in FCC 98-4 (Case No. 98-

1026). The petition of Willsyr is timely filed with respect to the D.C. Circuit's denial on March 31, 1998, of its motion to recuse and the dismissal of its appeal of the FCC's order in FCC 98-4 (Case No. 98-1060).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The provisions involved in this petition are Article III and the Fifth Amendment; 28 U.S.C. 455 (a); 5 U.S.C. 706 (2); and 47 C.F.R. 73.3592(b). They are included in the Appendix.

STATEMENT OF THE CASE

The FCC proceeding commenced in 1987 with the filing of competing applications for the Biltmore Forest FM frequency. In National Communications Industries, 7 FCC Rcd 1703 (1992), Orion's application was tentatively granted as "comparatively" superior, and conditioned it upon the outcome of any judicial appeal. Willsyr, along with Skyland Broadcasting Company, were found fully qualified to be FCC licensees. Two other competing applicants were disqualified.

The initial grant to Orion was rendered on February 28, 1992. It was prior to any petitions for reconsideration being filed at the FCC by the competing applicants. This initial grant was after the D.C. Circuit had rendered its decision

on January 31, 1992, in Bechtel v. FCC ("Bechtel I"), 957 F.2d 873, 875 (1992), which first questioned the legality of the FCC's comparative "integration" criterion and which first started remanding such proceedings for reconsideration of any grant made on the basis of "integration."

The February 28, 1992, conditional grant to Orion was based solely upon the comparative "integration" criterion. Orion was found to be the only applicant with 100% quantitative credit under that criterion. In Liberty Productions, a Limited Partnership, 7 FCC Rcd 7581 (1992) and 8 FCC Rcd 4264 (1993), the FCC denied petitions for reconsideration directed against the grant of Orion's application.

These petitions raised issues as to Orion's financial qualifications based upon newly discovered evidence with respect to its financial plan as presented to the FCC. The new evidence consisted of unpaid IRS tax liens against Orion's principals in the amount of several hundred thousand dollars.

In appeal briefs to the D.C. Circuit (Case No. 92-1645), the competing applicants contended that the FCC had misapplied its "integration" criterion to favor Orion. The award of 100% integration to Orion was improperly based upon credit for Betty Lee as a proposed manager/owner of the new FM station.

During the over 40 years that Betty Lee's husband, Zeb Lee, who is a co-owner of Orion, had owned and operated an AM

station (WSKY) in Asheville, she had no appreciable management or ownership role. The competing applicants contended that Betty Lee's "integration" proposal in the Biltmore Forest FM application was a "sham" which was designed to garner Orion a then applicable gender preference for "female" management and ownership.

Prior to oral argument in Case No. 92-1645, the Court rendered its decision in December 1993 in Bechtel II, which found the "integration" criterion to be "arbitrary and capricious." The FCC was directed to not use this rationale in any pending cases, such as Biltmore Forest, and to adopt a new criteria for these pending cases that was free of the "integration" rationale.

In January 1994, Zeb Lee, an Orion principal, sold WSKY(AM) in Asheville, which he had owned for over 40 years. This sale resulted from and was required by IRS tax liens against the station and from other unpaid debts of the Lee family. The proceeds from the sale were not sufficient to pay all the outstanding obligations of the Lee family. See, Orion's petition filed with the FCC on January 16, 1996, pp. 4-8, 13-15, n. 4.

On March 15, 1994, the Court acting sua sponte issued an order which reversed the FCC decisions in the Biltmore Forest proceeding (Case No. 92-1645 and Con. Cases) and remanded to select a grantee under a new criteria in light of Bechtel that is free of "integration." (App. A,

1a). Orion did not file a petition for rehearing seeking review of that order.

Orion, however, needed to immediately operate on the Biltmore Forest FM frequency in order to generate income to pay the debts and obligations of the Lee family. After the sale of Zeb Lee's AM station to pay IRS tax liens, they had no source of income and the only potential income producing and unencumbered asset they had was the Biltmore Forest FM application. See, Orion's motion, p. 3, filed with the FCC on November 6, 1996, and Declaration of Zeb Lee, pp. 3-4, paras. 8-9 (App. C, 15a).

Without filing with the FCC an application for interim authority to operate, after the reversal of its grant on March 15, 1994, and pending the outcome of the remand ordered by the D.C. Circuit, Orion commenced construction and operation of the Biltmore Forest FM station. This was on May 27, 1994, and was completed on July 29, 1994. See, Declaration of Zeb Lee, dated December 4, 1996.

In Orion Communications Limited, 10 FCC Rcd 13066 (1995) (App. B, 2a), the FCC reversed a staff action upholding Orion's unorthodox and unprecedented commencement of operations. Therein, the FCC rescinded Orion's conditionally granted construction permit and ordered it to cease its unauthorized and for-profit operations to allow a joint interim operation by all the competing applicants, pursuant to 47 C.F.R. 73.3592 (b) (App. S, 66a).

An application for joint interim authority was filed by BFR with the FCC and placed on public notice on December 4, 1995. Orion was invited to file its own interim application, join with BFR, or file a petition to deny raising objections to the qualifications of BFR. It refused or declined to do either.

In Orion Communications Limited, 11 FCC Rcd 19589 (1996) (App. C, 10a), the FCC affirmed its decision in 10 FCC Rcd 13066, rescinding the construction permit that had been tentatively granted to Orion (because it was conditioned on the outcome of any judicial appeal) and ordering Orion to cease its unauthorized and for-profit operations to allow a joint interim operation by BFR, which had been found qualified by the FCC to operate.

Orion sought a stay from the D.C. Circuit of the FCC's orders that required it to cease its unilateral operation in favor of BFR. In its motion for stay, Orion alleged "irreparable harm" if it was required to cease operations. On February 27, 1997, the Court denied Orion's motion for stay (App. D, 20a).

BFR commenced operations on June 2, 1997, pursuant to explicit authority from the FCC. Orion initially defied the FCC's order and for almost 24 hours "jammed" BFR's signal. It went off-the-air only under the threat of sanctions from the FCC (App. F, 25a-26a).

Orion's counsel of record before the D.C. Circuit, Wright H. Andrews, Jr., is

also its registered lobbyist before the U.S. Senate. He is primarily a Congressional lobbyist and not an appellate counsel.

After the D.C. Circuit's denial on February 27, 1997, of Orion's motion for stay of the FCC's 1995-96 orders requiring it to cease its unauthorized operations, U.S. Senators Jesse Helms and Lauch Faircloth publicly became advocates for the interests of Orion's FCC application.

A stockholder in one of the competing applicants (Skyland Broadcasting Co., which is a member of BFR) is Congressman Mel Watt (Dem-NC). He is an African-American. Senators Helms and Faircloth are long-time political adversaries of Mr. Watt and his mentor, Harvey Gantt, who was a candidate for the U.S. Senate.

Orion is the only applicant for the permanent license for the Biltmore Forest FM frequency that is headed by a white male. BFR, which is composed of the other competing applicants, is a multi-cultural and multi-racial group.

Senator Faircloth unsuccessfully sought in May 1997 the adoption of legislation to award the Biltmore Forest FM frequency to Orion. The Senator thereafter vowed to "vigorously" pursue this matter if necessary to assure the grant of the Biltmore Forest FM frequency to Orion. Congressional Record, May 8, 1997, p. S4249 (App. E, 22a).

In a speech on the Senate floor, Senator Faircloth addressed the merits of

the Biltmore Forest case (which is a restricted adjudication) and he questioned the applicability of the D.C. Circuit's Bechtel decisions to the case. The Senator charged that the FCC had engaged in "irregularities" in its handling of this proceeding and attacked as "liars" the applicants competing against Orion. Cong. Rec., p. S4249 (App. E, 22a-23a).

Senator Faircloth also asserted that the applicants competing against Orion have no interest in operating the station and their applications were filed merely to "blackmail" payment from Orion. These allegations were not based upon any record evidence, or other documentation. Cong. Rec., p. S4249 (App. E, 23a-24a).

After William Kennard was nominated by President Clinton to be the FCC Chairman, Senator Jesse Helms placed a hold on Mr. Kennard's nomination in October 1997 because of his displeasure with the FCC for not favoring Orion's application. Prior to the vote on the nomination, the Senator met with Mr. Kennard in a private meeting to discuss the merits of the Biltmore Forest case and Orion's application (App. G, 28a).

In a speech on the Senate floor, Senator Helms addressed the merits of the Biltmore Forest case. He attacked the applicants competing against Orion as basing their applications purely on "minority preferences" and anointed Orion as the rightful licensee for the Biltmore Forest FM frequency because its owners had

previously operated an AM broadcast station in nearby Asheville for over 40 years and would be managing the FM station on a day-to-day basis. Cong. Rec., October 29, 1997, pp. S11308-11309 (App. G, 29a).

Senator Helms also expressed his disapproval of the D.C. Circuit's decisions in Bechtel, which caused the FCC's action in ordering Orion to cease its unauthorized operations. According to the Senator, it is unfair that the Bechtel decisions apply to Orion because it had already prevailed at the FCC under the "integration" criterion before it being invalidated by the D.C. Circuit. Cong. Rec., p. S11309 (App. G, 30a-32a).

Senator Helms characterized Orion's situation as "unjustifiable" and wanted it "rectified" immediately. He noted that the D.C. Circuit "will shortly issue a decision in the near future" about "the manner in which the FCC has handled Orion's application." Cong. Rec., pp. S11308-11309 (App. G, 28a, 30a).

In order to assure the grant of Orion's application, Senator Helms demanded that the Biltmore Forest proceeding be decided under the existing hearing record and on the basis of the comparative hearing process that was invalidated by Bechtel. In the event that the D.C. Circuit disagrees with him, he indicated that he will "swiftly move legislation to overturn any such court ruling." Cong. Rec., pp. S11309-11310 (App. G, 31a, 33a-34a, 36a).

Less than two months after Senator Helms' criticism of the D.C. Circuit for applying its Bechtel decisions to Orion and his directive that Orion be immediately put on-the-air, the D.C. Circuit issued on December 19, 1997, its decision in Orion v. FCC. This decision was in favor of Orion even though it had presented to the D.C. Circuit the same arguments that it had presented in its unsuccessful motion for stay, which had been denied on February 27, 1997.

The decision in Orion v. FCC wholly complied with the demands of Senator Helms and Faircloth in every material respect (App. E, 22a-24a; G, 28a-38a). The decision provided for the first time a rationale for the D.C. Circuit's decisions in Bechtel not to apply to Orion.

The decision in Orion v. FCC attacked the applicants competing against Orion as "lacking integrity" and provided a rationale for the FCC to ultimately award the permanent license to Orion (App. H, 48a-50a). These matters had not been properly raised by Orion in its appeal which was solely with respect to interim operational authority, nor were these matters briefed by the parties.

The decision in Orion v. FCC was also based on the rationale that the FCC's 1995-96 actions ordering Orion to cease its unauthorized operations were inconsistent with the decision in Highlands Broadcasting Co., 9 FCC Rcd 5746 (1994) (App. H, 52a). The Highlands case

was appealed to the D.C. Circuit just prior to the September 26, 1997, oral argument in Orion v. FCC. See, Case No. 97-1603, filed September 17, 1997. The appellant therein raised the issue that the FCC's Highlands decision was wholly inconsistent with FCC rules in 47 C.F.R. 73.3592 (b) and with long-established precedent of the D.C. Circuit, in Consolidated Nine, Inc. v. FCC, governing interim broadcast operations.

At the time that Orion v. FCC was issued on December 19, 1997, the D.C. Circuit contacted the parties to the Highlands case and directed them to enter the court's appellate mediation program. The purpose of such mediation is to allow the parties to settle the proceeding without the court rendering a decision on the merits.

Senators Helms and Faircloth had expressed no preference as to the grant of any particular applicant in the Highlands case. That case has now been settled with no appellate decision being rendered. The D.C. Circuit never offered the Biltmore Forest applicants any opportunity to enter its appellate mediation program.

Orion went on-the-air on January 16, 1998, after issuance of the mandate in the December 19, 1997, decision in Orion v. FCC (App. J, 56a). It continues to broadcast on a for-profit basis. However, it refuses to file an application for an interim license, which would require it to show its current legal and financial

qualifications to be an FCC licensee.

The decision in Orion v. FCC rests on the assumption that the FCC would by February 1, 1998, adopt by rulemaking a new selection criteria for "comparative" proceedings in order to make a grant of the permanent license in Biltmore Forest (App. H, 54a). Such grant of a permanent license would terminate any ongoing interim operations and would bring the FCC proceeding to a close. However, the FCC has yet to adopt such a new selection criteria and there is no indication that it will act in the foreseeable future.

On May 20, 1998, BFR filed with the FCC a petition to terminate Orion's interim operations. Therein, BFR alleged that Orion is not qualified to be either an interim or permanent licensee.

In support of its allegations, BFR presented newly discovered documentary evidence demonstrating that Orion had made repeated misrepresentations to the FCC and to the D.C. Circuit as to its ownership structure. Orion obtained its initial grant from the FCC in 1992 based upon an ownership structure that garnered it 100% "integration" credit.

The newly discovered evidence presented by BFR shows Orion's ownership structure to be a "sham" not deserving of any such "integration" credit. BFR's petition also presented documentary evidence showing that Orion had repeatedly misrepresented to the FCC and the D.C. Circuit its financial qualifications.

REASONS FOR GRANTING THE PETITION

I. The intervention of U.S. Senators Jesse Helms and Lauch Faircloth in this proceeding to advocate the grant of the application of Orion Communications Limited, and thereby to influence the actions of the D.C. Circuit and the FCC, violated Article III of the U.S. Constitution and violated the "due process" rights, under the Fifth Amendment, of Biltmore Radio, Inc., and Willsyr Communications, Limited Partnership, to fairly compete with Orion for both the interim and permanent license for the Biltmore Forest FM frequency, thus requiring the invalidation of the D.C. Circuit's decision in Orion Communications Limited v. FCC, 131 F.3d 176 (1997).

(a) Congressional Interference in a Federal Judicial and Quasi-Judicial Agency Proceeding is Improper

Article III, Section 1, of the U.S. Constitution, guarantees independent and impartial adjudication by the Federal judiciary that is free from domination or influence from the Congress, or any of its members. This provision was "designed [by the genius of the Founders of our Nation] as a protection for parties from the risk of ... legislative pressure on a judicial decision." CFTC v. Schor, 478 U.S. 833, 848 (1985). "A judiciary free from control by the ... legislature is essential ..."

U.S. v. Will, 449 U.S. 200, 217 (1980).

"As early as 1776, it was clear that our nation was destined to be a government of laws and not of men. In their complaint against the abuses of the British Crown, the framers of the Declaration of Independence included the statement that: He has made Judges dependent on his Will alone ..." Pillsbury v. FTC, 354 F.2d 952, 963 (5th Cir. 1966).

"A first principle of Anglo-American jurisprudence, ... basic to the conception of due process ... is that the ends do not justify the means." Pillsbury v. FTC, id., at 964. A fair trial in a fair tribunal is a basic requirement of "due process." In Re Murchison, 349 U.S. 133, 136 (1955). An unbiased and impartial decision maker is essential to "due process." Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

A Federal judicial, or quasi-judicial administrative agency action, is invalid if based in whole, or in part, upon Congressional pressures. D.C. Fed. of Civic Ass'n v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1972), cert. denied, 405 U.S. 1030 (1972). Congressional interference so tainting the judicial and administrative process violates the right of a party to "due process" under the Fifth Amendment. Id., at 1245-1249; Pillsbury v. FTC, 354 F.2d at 963-965.

With regard to judicial decision making, whether by a court or by an agency, the appearance of bias or pressure

may be no less objectionable than the reality. D.C. Fed. of Civic Ass'n. v. Volpe, 459 F.2d at 1246; Pillsbury v. FTC, 354 F.2d at 964. See, 28 U.S.C. 455 (a), requiring the recusal of Federal judges because of the appearance of partiality; Liteky v. U.S., 510 U.S. 540, 547-548, 563 (1994). Justice must satisfy the appearance of justice. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986).

The right of parties to a fair trial, and equally important their "right to the appearance of impartiality," cannot be maintained unless decision makers are free from powerful political influences. A member of Congress subjecting judicial decision makers to a searching examination as to how and why they reached their decision in a case still pending before them and criticizing them for reaching the wrong decision sacrifices the appearance of impartiality --- the sine qua non of American ... justice. Pillsbury v. FTC, 354 F.2d at 964.

Bias by a judge, or its appearance, which results from influence, or the appearance of influence, by a U.S. Senator is a form of partiality that is wrongful or inappropriate. U.S. v. Diaz, 797 F.2d 99, 100 (2nd Cir. 1986).

Scienter or knowledge by a judge as to improper political influence is not a requirement for recusal or for a violation under 28 U.S.C. 455 (a). See, Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859-860, 864-865, n. 12 (1988).

(b) Factual Analysis Re: Intervention of Senators Helms and Faircloth

The facts showing the intervention of Senators Helms and Faircloth in this proceeding and their political influence in determining the outcome of the D.C. Circuit's December 19, 1997, decision in Orion v. FCC are as follows.

This case came before the D.C. Circuit in a motion for stay filed by Orion. Therein, Orion requested that the D.C. Circuit stay the FCC's orders in 10 FCC Rcd 13066 and 11 FCC Rcd 19589 directing it to cease its unauthorized and for-profit operations in favor of a non-profit joint interim operator that was composed of and open to all the competing applicants in the Biltmore Forest FM proceeding, pursuant to 47 C.F.R. 73.3592 (b) (App. B, 2a; C, 10a; S, 66a).

According to the contentions of Orion, it would suffer "irreparable harm" if it was required to cease operations. The D.C. Circuit denied Orion's motion for stay on February 27, 1997 (App. D, 20a). BFR, the joint interim operator, commenced operations on June 2, 1997 (App. F, 25a). This was in reliance on the FCC's 1995-96 orders and on the D.C. Circuit's denial of Orion's motion for stay of those orders.

In the December 19, 1997, decision in Orion v. FCC, the FCC's 1995-96 orders were abruptly reversed by the D.C. Circuit. It was then determined that Orion had suffered irreparable harm by

being required to cease operations on June 2, 1997, in favor of the joint interim operator. This harm was considered to be so great that the FCC was directed to immediately reinstate Orion's operations (App. H, 54a).

Orion had presented the same factual and legal arguments to both panels as to irreparable harm. Nothing had changed other than the directives of Senators Faircloth and Helms from the floor of the Senate on May 8 and October 29, 1997, demanding that the D.C. Circuit put Orion on-the-air immediately and award it the license for the Biltmore Forest FM frequency (App. E, 22a-24a; G, 28a-38a).

Orion's counsel of record before the D.C. Circuit is also its registered lobbyist before the U.S. Senate. The pronouncements of Senators Faircloth and Helms from the Senate floor were directed to the D.C. Circuit. They criticized the D.C. Circuit's decisions in Bechtel v. FCC because of their applicability to Orion. The Senators also attacked the applicants competing against Orion as unfit to be FCC licensees (App. E, 22-24, G, 28a-31a).

The decision in Orion v. FCC precisely conformed with the demands of Senators Helms and Faircloth. It suggested for the first time a rationale for Bechtel v. FCC not applying to Orion. According to Orion v. FCC, "Orion's license would probably have been final long before [the] decision in Bechtel unsettled the matter if only the rejected

applicants had not filed repetitious appeals" (App. H, 49a-50a).

The "repetitious appeal" issue was not properly raised by Orion in its appeal and was not briefed by the parties. Thus, this would show that the D.C. Circuit's decision was actually in response to the criticism and directives of Senators Helms and Faircloth, rather than a decision on the pleadings before the court.

The decision in Orion v. FCC, attacked the competing applicants as "lacking integrity" (App. H, 48a). This would also create a rationale for Bechtel v. FCC not to apply to Orion.

The issue of the competing applicants' integrity was not properly before the D.C. Circuit in Orion's appeal and was not briefed by the parties. Thus, this would indicate that the decision was actually in response to the criticism and directives of Senators Helms and Faircloth, rather than a decision on the pleadings before the court.

The decision in Orion v. FCC is based on the FCC's decision in Highlands Broadcasting Co. According to Orion v. FCC, the FCC's action in taking Orion off-the-air is inconsistent with Highlands (App. H, 52a-53a).

Just prior to the oral argument in Orion v. FCC on September 26, 1997, the Highlands case was appealed to the D.C. Circuit (Case No. 97-1603, filed September 17, 1997). Therein, the appellant raised the issue that Highlands is inconsistent

with 47 C.F.R. 73.3592 (b) and with established precedent of the D.C. Circuit in Consolidated Nine, Inc. v. FCC, 403 F.2d at 589-590, governing interim broadcast operations.

At the same time that Orion v. FCC was issued on December 19, 1997, the D.C. Circuit contacted the parties to the Highlands case and directed them to enter the appellate mediation program. This was during the same time period that the Orion v. FCC panel immediately issued the mandate which put Orion back on-the-air and attempted to thwart the appeal rights of the joint interim operator and the competing applicants.

The apparent reason for the D.C. Circuit to direct the Highlands parties to enter the appellate mediation program was to avoid rendering a decision that might conflict with or undermine the decision in Orion v. FCC, which held precisely as demanded by Senators Helms and Faircloth. Although the Highlands appeal raised the same issue as in Orion v. FCC, Senators Faircloth and Helms had expressed no preference as to which applicant should prevail in Highlands.

Accordingly, the facts and circumstances of this proceeding would demonstrate, or at least reasonably create the appearance, that the December 19, 1997, decision in Orion v. FCC was influenced by the Senate speeches of Senators Helms and Faircloth addressing the merits of Orion's application and the

Biltmore Forest proceeding, which was then pending before the D.C. Circuit. The December 19, 1997, decision abruptly and suddenly reversed prior rulings and decisions of the D.C. Circuit and wholly adopted and embraced the directives of Senators Helms and Faircloth, as stated in their Senate speeches.

(c) Legal Analysis Re: Intervention of Senators Helms and Faircloth

Where, as in Orion v. FCC, a decision maker suddenly or abruptly reverses course, it can be readily inferred that political or other improper pressure influenced the decision. ATX, Inc. v. U.S. Dept. of Transp., 41 F.3d 1522, 1529 (D.C. Cir. 1994). See also, Calderon v. Thompson, U.S. Sup. Ct., decided April 29, 1998, Case No. 97-215, pp. 10-12.

Another factor showing political influence, or other improper pressure, is the decision being weakly-supported. The "weak support" in Orion v. FCC is shown by Judge Douglas Ginsburg inexplicably holding, that 47 C.F.R. 73.3592 (b) and Consolidated Nine, Inc. v. FCC, 403 F.2d 585, 589-590, did not appear to apply to the Biltmore Forest FM proceeding and that in any event that issue need not be decided (App. H, 46a-47a).

However, in La Star Cellular Tele. Co. v. FCC, 899 F.2d 1233, 1235-1236 (D.C. Cir. 1990), Judge Ginsburg noted that 47 C.F.R. 73.3592 (b) requires the FCC to

favor joint interim applicants [such as BFR] over individual interim applicants [such as Orion]. Judge Ginsburg further noted that the FCC "must balance the public interest in the immediate issuance of an [interim] license against the potential harm to the fair consideration of competing applications" and cited in support to long-established precedent in Consolidated Nine v. FCC, 403 F.2d at 589-590, and Community Broadcasting v. FCC, 274 F.2d 753, 761-763 (D.C. Cir. 1960).

(d) BFR Has Suffered Injury as a Result of the Decision in Orion v. FCC

BFR has suffered actual legal injury as a result of the decision in Orion v. FCC. Acting in reasonable reliance upon the 1995-96 orders of the FCC authorizing BFR to commence interim operations and directing Orion to cease its unauthorized operations, BFR incurred substantial costs in constructing an FM station in Biltmore Forest and in operating it.

That investment in time and money has now been lost as a result of Orion v. FCC terminating BFR's operations and allowing Orion to supplant it. BFR and its members have also suffered reputational injuries as a result of Orion v. FCC attacking their character.

These actual legal injuries give BFR standing to seek the reversal of Orion v. FCC. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

(e) The Applicants Competing Against Orion Have Suffered a Separate Injury

Willsyr is one of four applicants competing against Orion for the permanent license for the Biltmore Forest FM frequency. Willsyr has diligently prosecuted its application since 1987 and remains fully eligible for grant as a basically qualified applicant.

Although Willsyr was not found to be the comparatively superior applicant under the now discredited "integration" criterion, it was found fully qualified to be a broadcast licensee by the ALJ and the FCC. These findings and conclusions as to Willsyr's basic qualifications, include the requisite character and integrity. National Communications Ind., 5 FCC Rcd 2862, 2879-2880, paras. 1-10 (ALJ 1990); 6 FCC Rcd 1978, 1979-1980, paras. 13-14 (Rev. Bd. 1991); 7 FCC Rcd 1703, paras. 1-2, 1705, n. 4 (1992); Liberty Prod., 7 FCC Rcd 7881, 7885, paras. 30-33 (1992).

As a result of Bechtel v. FCC, Willsyr has the legal right and entitlement to reconsideration with Orion under a new selection criteria for the permanent license that is free of the "integration" rationale. Whatever selection criteria and procedures that are adopted must accord "due process" to the competing applicants, such as Willsyr. Id., 10 F.3d at 887.

However, as a result of the actions of the D.C. Circuit and the FCC in placing

Orion on-the-air as the interim operator, at the directive of Senators Helms and Faircloth, Willsyr's "due process" right to fairly compete against Orion on a level playing field for the permanent license for the frequency has been prejudiced.

Under the holding of Consolidated Nine v. FCC, 403 F.2d at 589-590, and Community Broadcasting v. FCC, 274 F.2d at 759, the mere fact that one of the competing applicants is operating on the frequency on an interim basis invariably tends to prejudice the other applicants notwithstanding the FCC's good faith in trying to disregard the potential economic loss if the interim operator is denied the final grant. See also, La Star v. FCC, 899 F.2d at 1235-1236.

Indeed, Orion v. FCC held that "Orion's investment in building the station ... weighs in favor of permitting [it] to continue operating until the license is finally granted." It had initially constructed and operated because it prevailed under the now discredited "integration" criteria (App. H, 50a). If Orion's unauthorized operations must not be displaced because of its investment, then its current operations will not ever be displaced for another licensee.

Accordingly, Willsyr, as an applicant competing against Orion for the permanent license, has or will suffer cognizable injury as a result of Orion v. FCC and thus has standing to appeal the decision. FCC v. Sanders, 309 U.S. 470, 477 (1939).

II. The decision of the D.C. Circuit in Orion Communications Limited v. FCC, 131 F.3d 176 (1997), exceeded the authority of Federal appeals courts to review agency actions, pursuant to 5 U.S.C. 706 (2), and the decision improperly substituted the judgment of the D.C. Circuit for that of the FCC, thus requiring that it be invalidated.

(a) Judicial Review of Federal Agency Actions is Strictly Limited

Under the "arbitrary and capricious" standard, pursuant to 5 U.S.C. 706 (2), the scope of judicial review of agency actions is "narrow." A reviewing court should only consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. The agency need only articulate a rational connection between the facts found and the choice made. The court is not to substitute its judgment for that of the agency. Bowman Transp. v. Ark-Best Freight System, 419 U.S. 281, 285 (1974).

An agency action would be "arbitrary and capricious" if it "entirely failed to consider an important aspect of the problem." Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 45, 43 (1983). An agency need not consider every aspect of a problem. PBGC v. LTV, 496 U.S. 633, 645-646 (1990). A court is free to disturb an agency action only if it lacks any

rational and statutory basis, and not that it simply disagrees with the result. SEC v. Chenery, 332 U.S. 194, 207-209 (1947).

The judgment of the FCC as to how the public interest is best served is entitled to "substantial judicial deference." Its weighing of competing policies, when done on a rational basis, is not to be set aside by the courts, because this task has been delegated to the FCC to act with broad discretion. FCC v. WNCN Listeners Guild, 450 U.S. 582, 593-594 (1980).

It is the FCC, and not the courts, which must be satisfied that the public interest will be served. In licensing matters, the FCC is not required to consider every aspect of an applicant's proposal. The fact that the court might not have made the same determination as the FCC does not warrant a substitution of judicial for agency discretion. FCC v. WOKO, 329 U.S. 223, 228-229 (1946).

(b) Legal Analysis Re: the D.C. Circuit's Review of the FCC's Orders

The D.C. Circuit, in Orion v. FCC, reversed the 1995-96 orders of the FCC, as "arbitrary and capricious" (App. H, 39a). In so doing, the D.C. Circuit improperly made a policy judgment that Orion had been "reasonable" in first constructing and operating its station after the grant of its construction permit had been reversed by the court (App. A, 1a; H, 44a-45a).

In making this judgment, the D.C.

Circuit ignored its own precedent in Jacksonville Broadcasting Corp. v. FCC, 348 F.2d 75, 80 (1965), holding that a construction permit that is based upon an invalid grant is itself invalid and that any FCC action readopting an invalid permit is equally invalid.

The D.C. Circuit improperly made a policy judgment as to which entity should be the interim licensee (App. H, 54a). In so doing, it ignored the fact that Orion had never filed an application for an interim license. Only BFR had filed an application. Thus, the FCC could not have compared Orion's equities with BFR.

The D.C. Circuit improperly made a policy judgment that 47 C.F.R. 73.3592 (b), requiring the FCC to favor an interim operator composed of the competing applicants, did not apply. However, an agency's interpretation of its own regulation is owed substantial deference. Udall v. Tallman, 380 U.S. 1, 16 (1965).

The D.C. Circuit improperly made a policy judgment, based upon a 1990 ALJ decision, that some of the competing applicants "lacked integrity," and thus should not be an interim licensee (App. H, 48a). However, it ignored its 1994 order reversing that decision (App. A, 1a).

The D.C. Circuit improperly made a policy judgment that the FCC must be bound by the Highlands policy. However, a court is not to decide which among several competing policies best serves the public interest. FCC v. WNCN, 450 U.S. at 594.

CONCLUSIONS

This case presents a question of exceptional importance --- whether the political intervention of U.S. Senators in a Federal appellate and a Federal agency quasi-judicial proceeding on behalf of the interests of one of the competing parties violates the "due process" rights of the other competing parties? If the decision and orders of the U.S. Court of Appeals for the D.C. Circuit are allowed to stand, public confidence in the independence and integrity of the Federal judiciary will be severely diminished.

WHEREFORE, in view of the foregoing, BFR and Willsyr respectfully request that their petition for writ of certiorari be granted and that the decision and orders of the U.S. Court of Appeals for the D.C. Circuit in Case Nos. 96-1430, 98-1026, and 98-1060, be vacated or reversed as contrary to fundamental rights of "due process" and that these proceedings be remanded to the D.C. Circuit for further action consistent with law.

Respectfully submitted,

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